United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1818

To be argued by
BERNARD S. MEYER

United States Court of Appeals

FOR THE SECOND CIRCUIT

DAVID LANE and MARY ANN LANE,
Plaintiffs-Appellants,

—against—

GENERAL MOTORS CORPORATION, A. B. CHANCE CO. and PITMAN MANUFACTURING CO., a division thereof (herein referred to as "Pitman"), and GOODYEAR TIRE & RUBBER COMPANY,
Defendants-Appellees.

On Appeal from the United States District Court For the Southern District of New York

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

Preliminary Statement

Appellants, David Lane and his wife, Mary Ann, have bottomed their appeal on errors of law in the charge to the jury. They have argued in their main brief that as to the door latch issue the charge lacked definition, that it failed to focus on the one ultimate issue of fact, that it misstated the applicable products liability law of New Jersey, and that these and other errors, most particularly the failure of the trial judge to respond correctly to the jury's question whether safety latches were used on trucks in 1967, so fatally infected the jury verdict that this Court should exercise its power to correct such

fundamental error notwithstanding that no exception was taken to the charge.

General Motors' response is almost wholly diversionary. Its brief attempts to distinguish appellants' case authorities on grounds which, on analysis, simply do not wash, and resorts to distortion of the record, inapposite citations and wholly irrelevant arguments concerning, among other things, the weight of the evidence. To expose these logical and legal fallacies is the purpose of this reply brief.

ARGUMENT

POINT I

The weight of the evidence is irrelevant and appellee's argument on this issue is, in important respects, predicated on distortions of the record.

Appellants' central argument on this appeal is that at the end of the trial, which required fifteen trial days and the testimony of thirty-one witnesses, much of it on technical issues relating to vehicular design and accident reconstruction, only one ultimate issue as to the door latch remained--whether the plaintiff would have suffered paraplegia if GMC had equipped its truck with a safety non-burst latch--and that the trial court failed to focus the jury's attention on this issue. Determination

of the issue required the jury to decide whether it believed the testimony of GMC's witnesses that the major damage to the truck occurred at the same time that the door beside which David Lane was seated sprang open, or the testimony of appellants' witnesses that the damage occurred when the truck subsequently rolled over.

GMC, it is most important to note, agrees that the time relationship between the opening of the door and the damage to the chassis and superstructure of the truck was the major fact issue for the jury to determine. Thus, its brief notes that all of the experts agreed that the door latch sprang open at the same time as the right rear wheel hit the curb (Appellee's Brief, pp. 8, 11), and states that the controverted issue was whether the damage to the chassis and superstructure occurred at the same time as the rear wheels struck the median (Appellee's Brief, pp. 19, 20, 21), or when the truck rolled over (Appellee's Brief, p. 21).

The main issue for this Court is, therefore, whether a fair reading of Judge Weinfeld's charge, in the context of the highly complex and technical evidence that preceded it and in relation to the jury's communications during deliberation, supports the conclusion that the jury

was given sufficient direction and focus to permit it to resolve the narrow issue of fact before it, or whether the couching of the charge in general terms not definitively related to that issue of fact requires this Court's intervention to avoid a serious miscarriage of justice.

General Motors' brief joins issue on this question and after reviewing the facts concludes that the charge was sufficient and that "[t]he jury simply found that the door opened upon right wheel impact and that the damage to the chassis occurred at this time; in doing so, they chose to ignore Mr. Severy's 'common sense' explanation of the chassis damage." (Appellee's Brief, p. 35). The factual arguments upon which that conclusion is based go not to the focus and direction of the charge, however, but to the weight of the evidence, not in issue on this appeal, and are in important and material aspects inaccurate or distorted presentations of the record, as the following analysis shows:

Item -- On the question when the truck door opened, GMC devotes considerable effort to attempting to demonstrate inconsistencies between the testimony of plaintiff Lane and his fellow-passenger, Leighton, and that of other witnesses (Appellee's Brief, pp. 8-12, 14, 35) and concludes that the Lane/Leighton testimony was that the door opened prior to the rear wheel impact with the curb.

(Appellee's Brief, p. 35). This is inaccurate. Lane's testimony was simply that the door popped open "as we were going up over the divider" (T 906).* Leighton's testimony was: "[T]he front of the truck jumped the curb on the median, and the door came open, popped open, and Mr. Lane began to fall to his right. The truck was leaning to his right." (T 398)

Item -- GMC further suggests that its version of the Lane/Leighton testimony as to when the door opened was incorporated into the hypotheticals given to plaintiff's experts (Appelle's Brief, p. 11). This is untrue. The hypothetical given to Ehrlich assumed that the door opened after the truck began to heel. (T 633-634). Since the evidence was that the truck began to lean after the rear tire had struck the curb, Ehrlich correctly interpreted the hypothetical to mean that the door opened after the rear tire hit the curb. (T 746). The hypothetical given to Severy specifically instructed that the door opened "at about the time the rear hit the curb. . . ." (T 986). Moreover, and most importantly, GMC admits that all of the experts were in agreement that the door opened when the rear tire hit the curb and that the case was submitted to

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* Numbers in parentheses preceded by the letter T refer to pages of the stenographic transcript.

the jury on that theory. (Appellee's Brief, p. 11). GMC's entire discussion of the hypothetical questions is, therefore, purely diversionary.

Item -- In an effort to discredit the testimony of Lane's expert Severy that safety latches were used on trucks in 1962 and 1963 and that the forces at work during the accident would not have sprung such a safety latch, GMC first argues that Severy's testimony is self-contradictory since he later testified that Exhibit 76 (Ehrlich's safety latch) was not in existence before 1964. (Appellee's Brief, p. 15). There is no inconsistency. Severy testified simply that Exhibit 76 was "an anti-burst [latch]" with a mushroom type striker . . . present in vehicles starting about 1964. . . ." (T 974-975). He did not testify that Exhibit 76 was the <u>first</u> anti-burst latch design used in the industry, or that it was the only anti-burst latch design used in other vehicles. GMC next argues that in his assessment of the forces at work on the latch during the collision, Severy ignored the damage to the superstructure and the tire rim. (Appellee's Brief, p. 15). The testimony cited in support thereof, T 988 and T 1129, is, however, directly to the contrary. At T 988, as part of the hypothetical, Severy was informed that the superstructure, the Chance equipment and the polecat on the back of the truck, was destroyed

in the accident (see also T 998); at T 1129 Severy testified that he had recognized evidence of damage to the tire rim when he had studied photographs of the damaged truck.

Item -- In further attempt to discredit Severy's opinion, GMC states (Brief, p. 15) that "Severy also pointed out what he felt to be the objective evidence of the alleged defect in the latching system in the nature of certain marks that were on the striker plate" and that (Brief, p. 16) "The objective evidence of the defect in the latch, according to Severy, was the presence of scrapings on the striker plate." In fact, the "defect" in the latching system which Severy described was the design of its internal parts which tended to make it self-opening, as well as the lack of a vertical retention plate (see Appellants' Brief, p. 25). The testimony which GMC cites concerning the marks on the striker plate (T 980-981) was Severy's response to a question as to whether he believed that the striker plate produced at trial was in the same condition as after the accident (T 977). Severy testified that he believed it was in similar condition because the wear marks on the striker corresponded with those on the shroud (T 978-979) and because there was an impact mark (T 981) or evidence of paint disruption (T 1067) on the striker caused when it was struck by the rotation bolt during the accident.

Item -- Not content with the construction of this wholly inaccurate straw man, GMC goes on to cite the testimony of its own witness that the marks were not on the striker plate immediately after the accident (Appellee's Brief, pp. 17, 45), intending, apparently, to suggest that the marks were placed there through some machination of Appellants. The introduction of and emphasis placed by GMC on this testimony is, simply put, a red herring. The striker plate was in possession of both GMC's and appellants' experts prior to trial and there is no evidence to suggest that, if in fact the marks were new, they were intentionally made or were made by someone associated with appellants rather than someone associated with GMC. Moreover, as is apparent from the immediately preceding item, the marks were not important to appellants' case, whereas damage to the striker plate could be construed as supporting GMC's theory of the accident that "gigantic" forces caused the lock to open. Appellants' point is <u>not</u> that the Court should, therefore, conclude that GMC did in fact cause the marks to be placed on the striker, if in fact they were not caused in the accident, but rather that the innuendo sought to be injected by GMC's suggestion that the marks "unexplainably appeared on the striker plate prior to trial" (Appellee's Brief,

p. 17) is unfair and improper and should be disregarded by this Court.

Item -- Appellee argues repeatedly (see, for example, Appellee's Brief, pp. 16, 18, 21, 34), that the issue before the jury was whether "nominal" forces caused the latch to open during the accident. As a matter of law, however, it is irrelevant whether the forces at work on the latch as the truck hit the curb are characterized as nominal or otherwise. The only issue for the jury was whether an encapsulated latch would have held under similar circumstances. Moreover, although it is true Severy testified that only nominal forces were at work on the latch as the truck mounted the curb (testimony which was supported by the experimental findings of GMC's expert Morfopolous, see Appellants' Brief, pp. 33-34), it is untrue that Severy testified that the nominal forces on the latch "caused the permanent twisting to the chassis rails and the damage to the superstructure." (Appellee's Brief, p. 6). The damage to the chassis rails was caused, Severy testified, by the polecat slamdown which occurred when the truck turned over after the latch had opened (T 998).

Item -- Rather than focus on the real issue for the jury--whether a safety latch would have held when the rear tire struck the curb--General Motors seeks instead to

raise numerous extraneous issues. Despite the testimony of its own witness that encapsulated latches were an improvement in safety design (T 1513-1514), and were used on GMC cars prior to 1965 (T 1512), and despite the uncontradicted testimony of appellants' witnesses that such latches were used in the trucking industry prior to 1966, GMC suggests that appellants' proof of prior use in the industry was somehow wanting (Appellee's Brief, p. 15)[1/], that this left a sharp issue in dispute (Appellee's Brief, p. 42)[2/] and raised a substantial issue of fact for the jury (Appel-

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1/ The alleged defect in appellants' proof on this issue was that its witness Severy produced no "demonstrative" evidence on the point. However, Severy's expertise on matters of latch design had already been detailed for the jury (see Appellants' Brief, pp. 24-26).

2/ Of any imaginable litigant, GMC was best situated to offer proof as to the availability in 1966 of safety latches in the trucking industry. It chose not to do so. Rather, GMC argues on this appeal that the testimony of its expert Morfopolous that he "had never seen a 'safety latch' on a truck manufactured prior to the accident vehicle" (Appellee's Brief, pp. 41-42) was sufficient to rebut the positive testimony of appellants' experts.

lee's Brief, p. 42)[3/]. Alternatively, GMC suggests that the safety latch was not an improvement over its own design (Appellee's Brief, pp. 19-20), was only needed in a hardtop vehicle without a center "B" post (Appellee's Brief, pp. 17, 42)[4/] and even goes so far as to argue that its own latch was in fact a "safety latch" (Appellee's

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3/ Because appellants' witnesses testified that they only had personal knowledge of safety latches in cars and trucks smaller than the accident vehicle, GMC argues that there was an issue of fact as to whether such latches were efficacious in large trucks. In support of this argument, GMC cites testimony of Severy supposedly to the effect that there were no SAE recommendations that safety latches be used in trucks.

As to the first point, the uncontradicted testimony of Severy was that there was no difference in the principle upon which safety latches worked in trucks or cars (T 971, 982) and indeed there was a greater need for them in trucks (T 960). As to the second point, Severy was asked to give a "yes" or "no" response on cross-examination to a question as to whether he had in his possession "a copy of a truck standard that was published in 1966 by SAE for door latches." (T 1138-1139). He answered in the negative. It should also be pointed out that the present federal standard for door latches is identical for cars and trucks. (See Appellants' Brief, p. 33).

4/ Severy was asked on cross-examination whether he did not testify in a previous case on behalf of Volkswagen that a safety latch was not needed in their car because of the presence of a center "B" post and that a safety latch was only needed in cars without such center posts (hardtop models). Severy denied that this was the substance of his testimony. Instead, he stated that safety latches were necessary in hardtop models because of the lack of "B" posts and the larger size of the door (T 1144), but that he had testified that they were not required in

Brief, pp. 43-44).[5/] As clearly established in footnotes 1 through 5 hereof, none of these assertions have any merit.

Item -- In attempting to explain away the integrity during the accident of the latch on the man-cab manufactured by Pitman, GMC suggests there was no evidence that the Pitman latch was not identical to the GMC latch (Appellee's Brief, pp. 9-10). However, the testimony of Burlew at T 213-214, which was that the latches were different, simply cannot be willed away. In addition, GMC attempts to explain the integrity of the man-cab latch despite the "extreme" (Forrester, T 1490) or "gigantic" (Morfopolous, T 1640) forces exerted when the rear wheel hit the curb, by citing the testimony of Forrester that the most severe distortion of the chassis occurs "at the frame rail ends where cab doors happen to be. . . ." (Appellee's Brief, p. 19). However, Exhibits 113 and 114 (enlarged photographs of truck) demonstrate that the man-cab door was in immediate proximity to the GMC cab, and both were well forward of the center of

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Volkswagens not only because of the presence of a "B" post but because of the manner of construction of the vehicle and its size (T 1145). In addition, Severy had previously testified that safety latches were more necessary in trucks than cars because of the size of the doors (T 960).

5/ Experts for both sides had agreed that the accident vehicle was not equipped with the so-called "safety", "encapsulated" or "anti-burst" latch (See T 676-677, 688, 964, 1509). GMC's attempt on this appeal to use the testimony of Severy at T 960-961 in which he relates safety design to cabin volumes and door size as support for the "safety" of their product is incredible.

the truck. They would both, therefore, have been subjected to essentially the same force. In addition, GMC fails to note the directly contradictory testimony of Morfopolous (also cited at page 19 of Appellee's Brief) that the concentration of frame rail twisting would be at the rear axle, not the front axle where the GMC cab was positioned.

Item -- In support of its argument that the major damage to the chassis occurred when the rear wheel hit the curb, appellee relies on Newton's law of inertia "which established that the kinetic energy had to be and was dissipated by the violent striking of the median curb. . . ." (Appellee's Brief, p. 20). The argument that the full 580,000 foot pounds of kinetic energy (the product of the vehicle's weight times its speed) was exerted when the right rear tire hit the curb, is a subtle distortion of the principle of inertia that the full kinetic energy would have to be dissipated when the vehicle came to rest, i.e., after it had travelled the length of the ten foot median, digging a deep furrow therein, and after hitting with each of its four wheels against the median curb.

More inaccuracies and distortions of the record could undoubtedly be catalogued[6/] had appellants more

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6/ An additional item--dealing with the claim that appellants "refused" to stipulate concerning their requests to charge (see Appellee's Brief, p. 9, fn.)--is considered in Point III below.

time. Enough has been shown to make clear that appellee's factual arguments cannot be taken at face value. Nor should they be, in any event, for in advancing them appellee is really arguing that the weight of the evidence sustains the jury's verdict, an argument which, as already noted, is wholly irrelevant to the contentions advanced in appellant's main brief.

POINT II

The Bexiga and Finnegan cases are not distinguishable. The New Jersey law is that a truck manufacturer who fails to install a safety door latch available in the industry is liable to a passenger for injuries proximately resulting from the absence of the latch.

As noted in appellants' main brief, at pages 54-55, neither the availability of safety latches nor their efficacy was put in issue by General Motors. Appellants argued, therefore, that the only issue for the jury was the issue dealt with in Bexiga v. Havir Manufacturing Corporation, 60 N.J. 402, 290 A.2d 281, and Finnegan v. Havir Manufacturing Corporation, 60 N.J. 413, 290 A.2d 286, namely, was David Lane's paraplegia proximately caused by the manufacturer's failure to install a proper safety device?

Appellee first seeks to distinguish Bexiga and Finnegan on the ground they involved the absence of any safety device whereas, it is claimed, the latch in the accident truck was a "protective feature." (Appellee's Brief, p. 43). The factual impropriety of that claim has been dealt with above.[7/]

Appellee's second basis for distinction is that Bexiga and Finnegan do not support the argument that failure to install an available safety device renders a machine per se defective. Neither case involved the question whether a verdict could be directed for plaintiff on the issue,[8/] but it is clear from analysis of the Bexiga decision that the availability of a safety device that does not render the machine unusable not being in issue, a directed verdict on the issue of defect is proper. Thus, the Bexiga decision contains (290 A.2d at 285) the following statement, quoted in part at page 43 of appellee's brief.

> "We hold that where there is an unreasonable risk of harm to the user of a machine which has no protective safety device, as here, the jury may infer that the machine was defective in design unless it finds that the incorporation by the manufacturer of a safety device would render the machine unusable for its intended purpose."

7/ At footnote 5 on page 12.

8/ In Bexiga, the complaint was dismissed at the end of the plaintiff's case; in Finnegan, the trial judge granted judgment n.o.v. In neither, therefore, was there reason for the appellate court to consider more than what the jury could properly infer from the evidence in support of plaintiff's claim.

Since plaintiff's expert in Bexiga had not testified that safety devices then utilized in larger machines were equally appropriate for smaller machines such as that manufactured by Havir there was very clearly a jury question whether installation of such a device on the smaller machine would have rendered it unusable, in which event the machine would not have been defective, even though it posed an "unreasonable risk of harm to the user." If, however, such testimony had been offered and not put in issue, the condition set forth in the above quotation would have been met and plaintiff would have been entitled to a direction that the machine was "defective in design."

The fundamental error in the charge as given is that instead of presenting to the jury the simple and direct issue which GMC concedes (Brief, p. 43) was for the jury's decision:- "namely, would the injuries have occurred regardless of the presence of a 'safety latch,'" they were also told that they must determine whether the latch system was "designed to avoid unreasonable risk of injury in the event of an accident" (T 2431) and whether it "was defective in design, that is, that it was not reasonably fit to avoid increased risk of injury in the event of an accident," (T 2432), thus presenting to them a question which GMC had not put in issue.

Because the evidence adduced at trial was so technical and complex, and yet the issue for jury determination so narrow, the trial judge had an unusual responsibility to delimit the issues for the jury in light of the evidence, and in plain and non-technical language. This the charge did not do.

POINT III

Even if it be assumed that "defect" in the latch design was a jury question, the charge as to "defect" and "unreasonable risk of injury" was a misstatement of the law of New Jersey and was highly prejudicial to plaintiff.

Even though this Court should hold that there was an issue of fact for the jury concerning whether the absence of a safety latch was a "defect", there nonetheless should be a reversal for error in the charge. GMC cites a number of New Jersey decisions in which the term "unreasonably dangerous" or its equivalent is used and argues that this is the New Jersey rule of strict liability in tort. No doubt this language has found its way into New Jersey decisions since the phrase is used in the Restatement. In none of the cases cited by appellee, however, was the court called upon to rule as to the propriety

of the use of such language in a charge, and the New Jersey Supreme Court has not yet been called upon to do so, as the dissent in Collins v. Uniroyal, 64 N.J. 260, 315 A.2d 16, 20, n. 4, points out. For example, Brody v. Overlook Hospital, 127 N.J. Super. 331, 317 A.2d 392 (App. Div. 1974), cited by appellee, was an action for negligence and breach of warranty against a hospital brought by the estate of a patient who contracted hepatitis during a blood transfusion. The Appellate Division held as a matter of law that "unavoidably unsafe" products were not actionable and that the inclusion of "unreasonably dangerous" in the Restatement § 402A standard was intended to exclude such products from strict liability.

Clearly, it was the intention of the framers of the Restatement, in using the term "unreasonably dangerous", to exclude drugs which are unavoidably unsafe, see § 402A, Comment (k). The use of the terms "defective condition" or "unreasonably dangerous" in other situations, however, may very well be misleading, as the current Reporter of the Restatement, Professor John W.Wade, admits in his article "On the Nature of Strict Liability for Products," 44 Miss. L.J. 825. In that article, Professor Wade reviews the decision in Cronin v. J.B.E. Olsen Corporation, 104 Cal.Rptr. 433, 501 P.2d 1153 (1972), in which the California court

rejected the "unreasonably dangerous" standard of the Restatement. Professor Wade notes that the origin of the use of the terms "defective condition" and "unreasonably dangerous" was in regard to food products and the terms were deemed synonymous. The natural application of the term "defective condition" to manufactured products, he admits, would be where the product was not manufactured as intended. The use of the term in an improper design case, on the other hand, "is to use the term in a Pickwickian sense, with a special, esoteric meaning of its own." 44 Miss. L.J. at 832. Moreover, "[t]o have to define the term to the jury, with a meaning completely different from the one they would normally give to it, is to create the chance that they will be misled. To use it without defining it to the jury is almost to insure that they will be misled." Id. at 832. "Finally," he notes,"the term 'defective' gives an illusion of certainty by suggesting a word with a purported scientific meaning rather than a term connoting a standard involving the weighing of factors." Ibid. The use of the term "unreasonably dangerous" is equally problematic, Professor Wade writes, because it may "suggest an idea like ultra-hazardous, or abnormally dangerous, and thus give rise to the impression that the plaintiff must prove that the product was unusually or extremely dangerous." Ibid.

The indefiniteness of the charge given by Judge Weinfeld, rather than the precise term used, was, appellants urge, fundamental error. The repeated use of the terms "defective" and "unreasonable risk of injury" was fundamentally erroneous not so much for what those terms conveyed as for what they did not convey, for, as Professor Wade asserts: "Whatever word or phrase is used, a further explanation or indication of meaning is needed." 44 Miss. L.J. at 833.

Appellee makes much of the fact that the term "defective" was defined for the jury (Appellee's Brief, p. 39). The definitions referred to are "not reasonably fit for its intended purpose," "not reasonably safe for use," or some variation thereof. These phrases were, however, used in that portion of Judge Weinfeld's charge dealing with the stability issue.[9/] The charge concerning the latch, which was separate and distinct from the stability question (T 2430 - "Now let us turn to the plaintiff's addi-

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9/ (T 2427-2428). Comparison of the language of the charge on instability appearing at T 2428 with the plaintiffs' requests reprinted at page 27 of Appellee's Brief shows that the requests dealt with the stability issue and not with the latch issue. For this reason the requests to charge are irrelevant to this appeal, concerned as it is only with the failure to provide a safety non-burst latch, and the "refusal" of appellants to stipulate for the inclusion of them in the record of which appellee makes such a point in the footnote on page 9 of its brief is but another red herring.

tional claim which he advances solely against the defendant General Motors, which relates, as you know, to the latch system"), was phrased in terms of a duty "to avoid unreasonable risk of injury" (T 2431) and "a design reasonably adequate to avoid increased risk of injury." (T 2432). In any event, neither the latter phrases nor "not reasonably fit for its intended purpose" were sufficiently specific under the circumstances of this case, for nowhere in the charge relating to the latch claim were the elements of "defect" and "unreasonable risk of injury" set forth, much less defined in terms of the evidence before the jury.

POINT IV

The error was fundamental.

Appellants do not blink the failure of their trial attorney to object to the charge of Judge Weinfeld. Their argument is that the trial errors so affected the ability of the jury to reach its verdict intelligently that it would be a miscarriage of justice for the verdict to stand. Not content, however, to meet the issue of fundamental error, GMC places emphasis on the irrelevant. For example, there is no doubt there was approbation for the judge's charge.[10/] But praise can not cure error in the charge, particularly when the praise is offered

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10/ Appellee's citation of the remarks of Mr. Walkup relating to that portion of the charge concerning the ability of the chassis to support weight (Appellee's Brief, p. 23), however, hardly constitutes such praise.

during the argument of a post-trial motion (cf. Appellee's Brief, p. 24). Moreover, the appellee attempts to prove too much. For example, the affirmative response of the attorney of record to a question from the court as to whether all trial attorneys had been consulted prior to the supplemental charge is equated with approval by the attorney of record of the charge. (Appellee's Brief, p. 24). General references by the appellants in their briefs and before the jury to the "roll-over process" or "roll-over accident" are equated with the judge's specific and erroneous charge as to the plaintiff's theory of the evidence, namely, that the latch failed to hold "during the turnover of the vehicle." (T 2431) (see Appellee's Brief, pp. 25-26).

It is not clear from appellee's brief whether the doctrine of fundamental error has in fact been addressed. GMC argues that since there were disputed issues of fact, it was not a clear abuse of discretion to deny a motion for a new trial and therefore a miscarriage of justice cannot be claimed. The confusion is underscored by appellee's citation of a number of cases concerning motions for new trials made on the ground that the verdict was against the weight of the evidence and which involved no claim of fundamental error. Creagh v. United Fruit Company, 178 F. Supp.

301 (S.D.N.Y. 1959); Diapulse Corporation of America v. Birtcher Corp., 362 F.2d 736 (2d Cir. 1966), cert. dismissed 385 U.S. 801; see also Director General v. S.S. Maru, 459 F.2d 1370 (2d Cir. 1972), cert. denied 409 U.S. 1115 and Remington Rand Inc. v. U.S., 202 F.2d 276 (2d Cir. 1953). But, of course, the question of fundamental error in the charge is unrelated to whether the evidence would sustain a verdict for either party. Compare, Ferrara v. Sheraton McAlpin Corporation, 311 F.2d 294 (2d Cir. 1962).

The one appellate decision on fundamental error cited by appellee, Cohen v. Franchard Corporation, 478 F.2d 115 (2d Cir. 1973), cert. denied 414 U.S. 85, is not contrary to the appellants' position herein. In that case the appellant had failed to object to a portion of the charge relating to a narrow issue under the securities laws, namely, whether actual reliance was required to make out a fraudulent non-disclosure claim. He sought, nevertheless, to bring it up for review. Since the previous rule of the Second Circuit on the issue was in doubt in light of recent Supreme Court cases, it was held there was no plain error in the charge.

Despite the fact that the claim at bar sounds in strict liability, a burgeoning area of the law, the evidence at trial presented few, if any, novel issues. Indeed, the

parties are in agreement that the essential issue for the jury was that of proximate cause, whether "the injuries [would] have occurred regardless of the presence of a 'safety latch.'" (Appellee's Brief, p. 44). Thus, unlike Franchard, where the error cited related to a disputed issue of law, the fundamental error herein was the failure of the trial judge adequately to explain to the jury traditional legal concepts and to define them in terms of the narrow issues of fact before the jury. The case at bar is, thus, akin to Ferrara, supra, where this Court found fundamental error in the failure of the trial judge to define "constructive notice", rather than to the Franchard case.

POINT V

The confusion in the charge was compounded by the inclusion of the seat belt defense and by the court's failure to respond appropriately to the jury's question.

In their main brief (pp. 51-53), appellants demonstrate that under the peculiar facts of this case and in light of the judge's charge (which cites the opinion of GMC's expert that no paraplegia would have occurred if David Lane had worn his seat belt), appellee's seat belt defense could reasonably have been construed by the jury as a complete bar to recovery. Appellants have also set forth

the authority for their claim that under the law of New Jersey contributory negligence is not a defense to a strict liability claim for failure to install proper safety devices. The seat belt cases cited by appellee at page 40 of its brief are inapposite, because they do not concern actions alleging failure to install safety devices. Devaney v. Sarno, 125 N.J. Super. 414, 311 A.2d 208 (App. Div. 1973), cited by appellee, is a good example. There, a driver sued a car manufacturer for injuries caused by a defective seat belt. The evidence at trial was that the plaintiff was aware of the defect and, nonetheless, took the car on a pleasure trip. The Appellate Division held that it was a jury question whether the plaintiff had unreasonably encountered a known risk. It expressly noted, however, that contributory negligence would not be available as a defense in a strict liability action in a Bexiga type situation where the defect was not known to the owner or user.

In the instant case, there has been no suggestion that Mr. Lane was aware of the failure of GMC to install a safety latch in the Jersey Central truck. Under the rule of Devaney, contributory negligence is, therefore, not available to GMC.

Nor can any amount of rhetoric gloss over the fact that the jury's question ("Did anyone testify why safety non-burst locks were not used on trucks in 1967 (June 2, 1967)?") was based on the erroneous premise that such locks were not in fact in use. The fact that the jury's question began with "Why" did not permit the trial judge to ignore the fact that it contained a false premise. His duty was to correct the misapprehension of the jury, particularly where, as here, it relates to a crucial element of his charge. Appellants have argued that the issues of state of the art, "defect" and "unreasonably dangerous" should not have been left to the jury. But Judge Weinfeld did so and the jury obviously focused on this aspect of his charge since they inquired as to the evidence relating thereto.[11/] It was the judge's obligation to correct any misunderstanding as to such evidence which was disclosed by their question. Nor is it an answer to the point that during the course of his charge, the trial judge while marshalling the arguments of counsel had referred to ap-

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11/ Additionally, the inquiry by the forelady, immediately following Judge Weinfeld's answer to their earlier question, whether "we could speak with you privately about something we are trying to interpret, something you said." (T 2461) suggests confusion by the jury. They were told to go into the jury room, consult and write their question out, but twenty-four minutes later returned a verdict without having presented a written question.

pellant's contention that a safety latch was available.[12/] Evidently when, during deliberation, the question was submitted by the jury, this portion of the charge had either been forgotten or misunderstood. The failure of the court to rectify this fundamental misconception was plain error and requires reversal.

Conclusion

The trial judge committed fundamental error in misstating appellants' theory of proof as to proximate cause, in misapplying the law of New Jersey as it relates to a manufacturer's strict liability for injuries caused by its failure to provide safety latches generally available in the industry, in improperly charging as to the defenses available to GMC, in failing to narrow and define the issues before the jury and in incorrectly responding to a question from the jury on a primary fact issue relating to improper latch design. This Court should reverse the judgment of

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12/ The charge was: "Here plaintiff argues that a reasonably safe and available latch was the so-called encapsulated or anti-burst latch, and had one been installed, then under the conditions of this accident the door would not have opened, which, as you know, is disputed by the defendant." (T 2431).

March 20, 1974 dismissing the complaint and remand for a new trial.

Respectfully submitted,

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375—Affidavit of Service The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

United States Court of Appeals
for the Second Circuit

David Lane and Mary AnnLane

Plaintiffs-Appellants

against

General Motors Corporation, A.B. Chance Co. and Pitman Manufacturing Co. a Division thereof (herein referred to as Pitman), and Goodyear Tire and Rubber Company,

Defendants-Appellees

On appeal from the United States District Court for the Southern District of New York

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF New York , ss:

Raymond J. Braddick, agent for Morris Hirschhorn being duly sworn, deposes and says that he is over the age of 21 years and resides at Levittown, New York

That on the 2nd. day of December , 19 74 he served the annexed Reply Brief for Plaintiffs-Appellants upon

1. Roy Reardon Esq.
c/o Simpson Thacher & Bartlett Esqs.
1 Battery Park Plaza
New York, New York, 10004

2. Berman & Frost Esqs.
77 Water Street
New York, New York

in this action, by delivering to and leaving with said attorneys

three true copies to each thereof.

DEPONENT FURTHER SAYS, that he knew the persons so served as aforesaid to be the persons mentioned and described in the said action.

Deponent is not a party to the action.

Sworn to before me, this 2nd.

day of December, 19 74

Raymond J. Laddach.

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1975